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No. 82-21409

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILBUR HOBBY,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table of Cases and Other Authorities

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Petitioner Wilbur Hobby respectfully submits this reply brief to restate the facts of this case in a straightforward fashion; and restate the issues in light of the various contentions now before the Court.

THE FACTS OF THE CASE AND THE DECISIONS BELOW.

This is a case in which the Article III federal judges in the Eastern District of North Carolina exercised the appointive power vested in them by section 6(c) of the Federal Rules of Criminal Procedure to select white males as forepersons of fifteen consecutive grand juries extending over a seven year period. No blacks, no women were chosen for this leadership position.

Petitioner Wilbur Hobby (a white male) and Mort Levi (a black male) were indicted by one of these federal grand juries for conspiring to defraud the United States in connection with a CETA training program. Prior to trial, they filed motions to dismiss the indictments, and primarily relied on this Court's holding in Rose v. Mitchell, 443 U.S. 545

(1979). In Rose, this Court assumed that the practice of Tennessee judges to appoint only white males to be forepersons of the Tennessee grand juries required the dismissal of indictments issued by the grand juries so tainted.

In response, the government did not dispute that a prima facie case was made out by the testimony of petitioner's expert witness nor did it put on any evidence of any kind to justify the appointment by the Article III judges of white males only. Nor did the government argue that Rose was not controlling. Government cross examination sought only to show that the expert witness had no first-hand experience in the operations of grand juries. (J.A. 96-97). The District Court, without comment on this point, denied the motion to dismiss. (J.A. 113).

On appeal, the government argued only that Rose v. Mitchell was distinguishable

on its facts, because the forepersons of Tennessee grand juries played a larger role then did the forepersons of federal grand juries. The Court of Appeals accepted the evidence that "in the years 1974-1981 no Black had served as foreman of the grand jury in that district, and no woman" but held that Rose was not applicable. The Court below agreed with the Government's contention and affirmed the conviction because:

> "The roles of grand jury foreman in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states.... Their role is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection."

THE ISSUES NOW BEFORE THIS COURT AND THE POSITIONS TAKEN BY THE PARTIES

The issue on appeal to this Court is whether the courts below erred in

condoning the exclusive appointment of white males as forepersons of the federal grand juries. The positions of the parties are set forth below.

A. The Position of the Petitioner.

In Rose, this Court assumed, "without deciding" that:

> "discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire". 443 U.S. at 552, n. 551-552, n. 4.

Mr. Justice Blackmun wrote for the Court as follows:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any groups otherwise qualified to serve, impairs the confidence of the public in the

> administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government'. Smith v. Texas, 311 U.S. 128, 130 (1940). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts'. Ballard v. United States, 329 U.S. 187, 195 (1946). 443 U.S. 555-556.

Petitioner relies heavily on the rationale thus expressed in Rose, and began his brief by addressing head-on the holding of the court below that Rose is inapplicable because the foreman of Tennessee grand juries plays a larger role than does the foreperson of federal grand uries. Petitioner referred not only to Federal Rule of Criminal Procedure 6(c),

but also to the Handbook for Federal Grand Juries, the Model Charge to the Grand Juries, the statements of federal judges regarding their appointments, and the expert testimony of the social psychiatrists. Then, assuming arguendo and against the facts that federal forepersons play only the limited role as held by the Court below, petitioner argued that in any event, an Article III judicial selection process based on race or gender, either in whole or in part, cannot survive judicial review.

1. First, Petitioner reviewed the Equal Protection cases arising under the Fourteenth Amendment. Petitioner recognized the "same class rule" prevailing in these cases, but presented them as setting the tone in federal cases. See Hurd v. Hodges, 334 U.S. 24 (1948) where this Court "in the exercise of its supervisory powers over the courts of the

District of Columbia" refused to permit the judicial enforcement of restrictive racial covenants. Mr. Chief Justice Vinson adverted to the companion case of Shelley v. Kraemer, 334 U.S. 1 (1948) and held that:

> "It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States". 334 U.S. at 351.

See also Bolling v. Sharpe, 347 U.S. 497 (1954) where this Court struck down segregation in the public schools of the District of Columbia. Mr. Chief Justice Warren adverted to the companion case of Brown v. Board of Education, 347 U.S. 483

(1954) and held that:

> "In view of our decision that the Constitution prohibts the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution". 347 U.S. at 500.

2. Petitioner then moved on to Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979)--cases arising under Fifth and Sixth Amendments wherein the "same class rule" was abandoned. Prejudice was presumed in Peters, because as Mr. Justice Marshall wrote:

> "when any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps

unknowable". 407 U.S. at 503.

And in Taylor, Mr. Justice White held for the Court that the accused is "constitutionally entitled to a jury drawn from a fair cross section of the community", in large part because

> "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system". 419 U.S. at 530.

3. Finally, petitioner reached the "supervisory power" case of Glasser v. United States, 315 U.S. 60 (1942), Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and Ballard v. United States, 329 U.S. 187 (1946). These cases hold that "reversible error does not depend on a showing of prejudice in an individual case" because

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of prescribed standards of jury selection...."

Moreover, continued Mr. Justice Douglas:

> "The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, to the democratic ideal reflected in the processes of our courts". Ballard v. United States, 329 U.S. 187 at 195.

Exercise of the Court's "Supervisory Power" is especially demanded here. The Article III judges below were delegated the power to appoint forepersons by the Federal Rules of Criminal Procedure, promulgated by this Court. Thus, this Court is doubly involved. It has a general responsibility to supervise the conduct and activities of the lower federal courts as in Hurd and in Ballard above; it has a special accountability to ensure that the power it delegates is not utilized in an discriminatory fashion.

B. The Positions of the Amici Curiae

1. In Peters v. Kiff, 407 U.S. 493,

Mr. Justic White, with whom Mr. justice Brennan and Mr. Justice Powell joined, concurred in the judgment that a white person had standing to protest the systematic exclusions of black persons from Georgia juries:

> "to implement the strong statutory policy of section 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter". 407 U.S. at 507.

The NAACP Legal Defense and Educational Fund, Inc. filed an Amicus brief urging a like result under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq. That Act declares that it is the policy of the United States:

> "that all citizens shall have the opportunity to be considered for

service on grand and petit juries in the district courts of the United States...."

The NAACP Legal Defense and Educational Fund acknowledged that Congress did not "specifically outlaw discrimination in appointment of grand jury forepersons", but contends that the general language, sweep, and legislative history of the Act support "application of the statutory bar on discrimination to all aspects of discrimination within the grand and petit jury systems". Brief at p. 16.

2. In Taylor v. Louisiana, 419 U.S. 522, this Court held that "the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions". 419 U.S. at 526.

Amicus American Civil Liberties Union argues that so too, a respresentative

cross section of the community is an essential component of the Fifth Amendment guarantee that "no person" shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". Reliance is placed on Mr. Justice Powell's dissent in Castaneda v. Partida, 430 U.S. 482 (1977) that the federal right derived from the Fifth Amendment's explicit requirement of a grand jury "is similar to the right--applicable to state proceedings--to a representative petit jury under the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522".

C. The Position of the Respondent.

The Government does not contend that the "white male only" appointments are lawful. It admits that they are unlawful.

In its Response To The Petition for Certiorari, the Government announced an intention "to take steps to ensure that

the United States Attorneys call the attention of the courts in their respective districts to the importance of nondiscriminatory foreperson selection procedures". Brief for the United States, p. 16, n. 9. In its brief on the merits, the Government begins its Summary of Argument with the following statement:

> "The issue in this case is not whether discrimination against blacks or women in the selection of grand jury forepersons is lawful, for there is no dispute between the parties that it is not". Brief for the United States, p. 9

What then, does the United States argue? Frankly, petitioner has difficulty in answering this question, but sets forth his understanding as best he can.

First. The Government contends that the Fourteenth Amendment Equal Protection cases apply the "same class" rule and that petitioner as a white male has no "standing" to protest the exclusion of blacks or women. Brief, pp. 15-20. But

the Government does not deny that these cases set the tone and give guidance to this Court when exercising its supervisory power over the lower federal judiciary.

Second. Assuming "standing" under Peters and the Due Process Clause, the Government suggests that discrimination in the appointment of the foreperson is irrelevant ("in the absence of any overt manifestation of prejudice") when the discrimination "does not at all affect the overall composition of the grand jury". Brief, pp. 20-24.

That, of course, is the very issue before this Court.

Third. The Government suggests that discrimination in the selection of the foreperson is permissible as long as the discrimination is hidden from public view. Brief, pp. 25-26. The government points out that the grand jury "operates out of the public eye," and the identity, race

and gender of forepersons are not matters "generally known to the public--or to the members of a given grand jury". The Government admits that "a different result might be warranted" if a defendant "could show an open and notorious practice" by the supervising court of "explicitly excluding black or female grand jurors from consideration as forepersons by reason of their race or sex". But, concludes the Government, "petitioner does not claim that any such evidence of discrimination exists in this case". The only fitting response is "shame".

Fourth. The government repeats its arguments made to the Fourth Circuit that the duties of the forepersons are "essentially those of a clerk"; and that there is no showing here that "discrimination in his or her selection invades the districtive interests of a defendant". Brief pp. 28-34.

Fifth. Turning to the "fair cross section" requirement of Taylor and Duren, the Government contends that it cannot be extended to the selection of the foreperson, as one person alone cannot represent the divergent views, experiences and ideas of the distinct groups which form a community. Brief, pp. 34-38. Of course, petitioner is not arguing for the impossible. We do not dispute that there can be but one foreperson per grand jury. But we do contend that there be no systemstic exclusion of blacks and women from foreperson positions over an extended period of time.

Sixth. The Government suggests that the Court has no "supervisory power" to correct the admitted unlawful discrimination in this case, and refers to United States v. Payner, 447 U.S. 727 (1980) and United States v. Hasting, ___U.S. ___ 103 S.Ct. 1974 (1983).

In Payner, it was held that the District Court had no "supervisory authority" to suppress the fruits of an unlawful search that did not invade the respondent's Fourth Amendment rights, as this ran directly counter to the decisions that a court may not exclude evidence under the Fourth Amendment unless there is a violation of the defendant's own constitutional rights. In Hasting, it was held that the District Court erred in reversing a conviction because of comment in the prosecutor's closing argument, as this ran directly counter to the decisions that a conviction is not to be reversed because of error that is harmless. These cases are entirely inapposite. Each concerned the exercise of supervisory power by the District Courts in a way which conflicted with the results demanded by this Courts' decisions when deciding interrelated constitutional issues. Here,

of course, we urge exercise of this Court's supervisory power to implement, (not to defeat), an unbroken line of constitutional decisions going back for more than 1000 years.

Finally, the Government urges that the remedy of dismissing the indictment because of illegality in the discriminatory appointment of grand jury forepersons would impose substantial and unwarranted burdens upon the administration of justice. The Government suggests as an alternative, a novel and wholly untested administrative scheme of redress. Brief, pp. 40-50. In short, the Government asks this Court to repudiate a remedy forged in the triad cases of 1880, and reaffired over strenuous dissent just four years ago in Rose v. Mitchell.

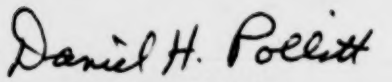
CONCLUSION

In all its contentions, the government proceeds on grounds entirely too narrow and artificial. Not once does it come to grips with the repeated holdings of this Court that exclusion of jurors because of race or gender is at war with our basic concepts of a democratic society; that such exclusion is odious in all aspects, and especially pernicious in the administration of justice; that it destroys the appearance of justice and casts doubt on the integrity of the judicial process; and above all, that the harm is not limited to the accused but injury extends to the jury system, to the law as an institution, to the community at large, and to the democratic ideal.

For reasons set forth above, and in the Brief in Chief, petitioner respectfully suggests that the decision below be reversed, and the indictment set

aside.

Respectfully submitted,



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